

Supreme Court, U. S.
FILED

JUN 29 1978

MICHAEL RODAK, JR., CLERK

**SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1977**

NO. . . . 77-1861

DOYLE KENT OGDEN,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

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SUPREME COURT OF THE UNITED STATES**October Term 1977**

No.

DOYLE KENT OGDEN,**Petitioner****vs.****UNITED STATES OF AMERICA,****Respondent****PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

To the Honorable WARREN E. BURGER, Chief Justice of the United States of America, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now DOYLE KENT OGDEN, Petitioner, by his attorney, Roger S. Hanson, Esq. of Santa Ana, California, a member of the Bar of the United States Supreme Court, and Ray Gene Smith, Esq., petitioning this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals, Fifth Circuit at New Orleans, Louisiana, to review constitutional errors occurring in his trial of possession of marijuana with intent to distribute conducted in the United States District Court for the Southern District of Texas in Corpus Christi, Texas.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioner submits the following:

(a)

OPINION BELOW

The United States Court of Appeals, Fifth Circuit rendered opinion on May 4, 1978, a copy of which is attached to this petition as Exhibit "A". Judgment was rendered on May 4, 1978, a copy of which is attached to this petition as Exhibit "B". A

Petition for Rehearing was made and was denied on or about May 30, 1978. A copy of the Order denying same is herewith attached as Exhibit "C".

(b)

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the date that the judgement which is sought to be reviewed was entered is May 4, 1978;

(ii) a petition for rehearing was made and denied on May 30, 1978, by the United States Court of Appeals, Fifth Circuit.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C 1254(1). The other grounds upon which jurisdiction of this Court is invoked involves the violation of certain constitutional amendments, namely the Fourth Amendment, the Sixth Amendment, the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States. The Honorable Robert Ainsworth, Circuit Justice for the Fifth Circuit granted time up to and including 29 June, 1978 to file this Petition.

(c)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offence to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by laws, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, Section One:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

CONSTITUTIONAL ISSUES PRESENTED

1. Whether the Court erred in its opinion affirming the Judgment of Conviction, by not properly applying the well established rule of **Miranda v. Arizona**, 384 U.S. 436, and in its judicial interpretations requiring careful scrutiny of the government's actions where the accused has asserted his right to an attorney.
2. Whether olfactory identification of marijuana by a border patrol agent at a permanent checkpoint, standing alone, gives rise to probable cause to search the trunk of petitioner's automobile.

3. Whether the Court of Appeals for the Fifth Circuit erred in holding that the trial court could limit the scope of petitioner's cross-examination of a key government witness where petitioner sought to establish motive or animus.

4. Whether the Court of appeals erred in holding that the trial court could allow a confession as admissible, when injury and deliberate infliction of pain for a minimum of 45 minutes or more is administered by the agents, and when a charge of assault on a federal officer amounts to extortion of a confession.

5. Whether the Court of Appeals erred in considering only the fact that Defendant Ogden was wearing handcuffs in deciding whether or not there was coercion on the parts of the agents, when in fact, the testimony shows that there was a considerable struggle at the checkpoint, that the border patrol agents were angry at Defendant Ogden, that Defendant Ogden was threatened by the threat of a charge of assault on an officer of the law, and this duress is shown factually in the testimony, and therefore the Court of Appeals erred in not considering the complete facts of the coercion of the confession of Defendant Ogden and erred in not considering the constitutional rights of Defendant Ogden in violation of the Sixth Amendment of the Constitution of the United States, that coercion being shown in the **Statement of Facts**.

6. Whether the Court of Appeals erred in upholding the trial court's overruling of the Motion to Suppress the using of the confession of Doyle Kent Ogden, extorted from Defendant Ogden, related by an agent, when conspiracy is not charged against Defendant Ogden in violation of the Sixth (6th) Amendment of the Constitution of the United States.

7. Whether the Court of Appeals erred in upholding the trial court's overruling Defendant's objection that the jury selection was improper, when, in fact, it denies the defendant the assistance of counsel in violation of the Sixth Amendment of the Constitution of the United States.

(e)

**STATEMENT OF FACTS IN SUPPORT OF
GRANT OF CERTIORARI**

On March 9, 1976, at approximately 6:00 a.m., a David Wayne Rankin was stopped at a Border Patrol Checkpoint located at a point seven miles south of Falfurrias, Texas on U.S. 281. As he talked with Rankin concerning Rankin's citizenship, Gordon Reed, a Border Patrol Agent said he smelled the odor of marijuana and observed Rankin's vehicle to be riding low, that it had no license plate on the front, and that it bore a Fort Sill sticker. Agent Reed testified that he obtained the keys from Rankin and discovered marijuana bricks in the trunk.

On the same date at approximately 6:25 a.m., at the same checkpoint, Agent Reed also stopped Doyle Kent Ogden and noticed that Odgen's vehicle had no license plate in front, had a Fort Sill sticker, had in it a can of Glade air-freshener, and detected an odor of marijuana. Agent Reed told Ogden he smelled marijuana, then asked Ogden to open the trunk. Ogden stated that Reed would need a search warrant, and he wanted a lawyer, or a lawyer present while the trunk was being opened. Agent Reed with considerable help, forcibly took the keys from Ogden, opened the trunk and discovered marijuana bricks.

Louis W. Dracoulis, Special Agent for the Drug Enforcement Administration testified at Ogden's trial that, after **Miranda** warnings were given, Ogden stated that he was the main trucker for the people in Oklahoma, that he had made eight to ten trips for the delivery of marijuana, that he was being paid \$8,000.00 for this load, and that he was paying Rankin \$1,000.00 to deliver part of the load. D.E.A. Agent Eakes, at Rankin's trial testified that, Rankin told him that he was being paid a thousand dollars by Mr. Ogden to drive the car to Oklahoma.

(f)

ARGUMENT

I

The Court, in its opinion affirming the Judgement of Conviction, did not properly apply the well established rule of **Miranda v. Arizona**, 384 U.S. 436, and its judicial interpretations requiring careful scrutiny of the government's actions where the accused has asserted his right to an attorney.

II

The Court of Appeals for the Fifth Circuit erred in holding that the detection of the odor of marijuana by a border patrol agent, standing alone, is sufficient to give rise to probable cause to search the trunk of petitioner's car.

III

The Court of Appeals for the Fifth Circuit erred in holding that the trial court could allow a confession as admissible, when injury and deliberate infliction of pain for a minimum of forty-five minutes or more is administered by the agents, and when a charge of assault on a federal officer amounts to extortion of a confession.

The Court of Appeals erred in considering only the fact that Odgen was wearing handcuffs in deciding whether or not there was coercion on the part of the agents, when, in fact, the testimony shows that there was a considerable struggle at the checkpoint, that the border patrol agents were angry at Defendant Ogden, that Defendant Ogden was threatened by the threat of a charge of assault on an officer of the law, and this duress is shown factually in the testimony, and therefore the Court of Appeals erred in not considering the complete facts of the coercion of the confession of Defendant Ogden in violation of the Sixth Amendment of the Constitution of the United States, that coercion being shown in the **Statement of Facts**, page 74, lines 16 through 25, page 75, lines 1 through 25, page 76, lines 1 through 25, and page 77, lines 1 through 5, as follows:

Page 75, lines 9 through 17:

Q. All rights, did Mr. Ogden complain to youall that the handcuffs were hurting his arms very much?
A. Yes, sir.
Q. And asked you, both of you, to "Please release the handcuffs, they are killing me"?
A. Yes, sir.
Q. All right. How long was if before youall did that, what he asked you to do?
A. I know we didn't do it right off.

Page 76, lines 3 through 5:

Q. Youall were angry at one another because of this altercation that you had, is that correct?
A. Yes, sir.
Page 79, lines 11 through 13:
Q. I say agent Jacobs was quite angry when he put the handcuffs on the man.
A. Yes, all three of us were angry.
Page 83, lines 3 & 4, lines 13 through 16, lines 21 & 22:
Q. All right. Were you angry about this particular altercation?
Q. As a result of that, your supervisor or yourself filed a charge against Mr. Ogden for aggravated assault on an officer, on yourself?
A. I believe it was aggravated assault on Agent Reed, filed in Agent Reed's behalf, not mine.

Page 96, lines through 25:

Q. All right, did they loosen the handcuffs then?
A. After about—between 45 minutes and an hour,—Officer Reed is correct, he loosened the handcuffs.
Q. All right, but for 45 minutes to an hour your handcuffs were hurting, is that correct?

See also, Statement of Facts, Page 24, line 17-20, Page 26, lines 15-23, Page 27, lines 1-5, Page 32, lines 3-10, Page 74, lines 16-25, Page 75, lines 1-25, Page 76, lines 1-25, Page 77, lines 1-5, Page 79, lines 4-13, Page 81, lines 5-25, Page 82, lines 2-4, lines 11-21, Page 83, lines 13-24, Page 94, lines 20-25, Page 95, lines 1-25, Page 96, lines 1-25, Page 97, lines 1-16, Page 122, lines 5-25, Page 123, lines 1-25, Page 124, lines 1-21.

IV

The Court of Appeals erred in upholding the trial court's overruling of the Motion to Suppress the using of the confession of Doyle Kent Ogden, extorted from Defendant Ogden, related by an agent, when conspiracy is not charged against Defendant Ogden in violation of the Sixth (6th) Amendment of the Constitution of the United States. **Dutton v. Evans**, 400 U.S. 74; **Bruton v. U.S.**, 391 U.S. 123; **U.S. v. Adams**, 446 F.2d 681 (9th Cir. 1971).

V.

The Court of Appeals erred in upholding the trial court's overruling Defendant's objection that the jury selection was improper, when, in fact, it denies the defendant the assistance of counsel in violation of the Sixth (6th) Amendment of the Constitution of the United States.

VI.

The Court of Appeals erred in holding that the trial court could limit the scope of petitioner's cross-examination of a key government witness where petitioner sought to establish motive or animus in violation of the Sixth (6th) Amendment of the Constitution of the United States by denying the defendant the assistance of counsel.

CONCLUSION

For each and every one of the serious foregoing constitutional issues, this Honorable Court should grant a hearing in federal courts.

DATED this 28th day of June, 1978, at Wichita Falls, Texas.

Respectfully submitted,

ROGER S. HANSON, ESQ.
RAY GENE SMITH, ESQ.
by ROGER S. HANSON,
Member of the Bar,
United States Supreme Court
Attorneys for Petitioner

DOYLE KENT OGDEN, Defendant-Appellant
No. 77-5245 United States Court of Appeals, Fifth Circuit
UNITED STATES OF AMERICA, Plaintiff-Appellee
May 4, 1978

OPINION

Defendant was convicted before the United States District Court of the Southern District of Texas, Owen D. Cox, J., of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) the detection of the odor of marijuana by a border patrol agent who stopped defendant's car at a permanent checkpoint was sufficient to support the warrantless search of defendant's car, and (2) in absence of any evidence that defendant's decision to speak was involuntary and where defendant had indicated there he understood the **Miranda** warnings he was given, defendant's post-arrest inculpatory statement were admissible.

Affirmed.

1. Criminal Law - 394.4(12)

Bricks of marijuana found in warrantless search of defendant's car were admissible, in prosecution for possession of marijuana with intent to distribute, where marijuana was found in search conducted by border patrol agent who had stopped defendant's car at a permanent checkpoint and who had detected the odor of marijuana emanating from the car. Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a) (1), 21 U.S.C.A. Sec. 841(a) (1).

2. Customs Duties - 126

Detection by a border patrol agent of the odor of marijuana emanating from a car is sufficient to support probable cause to search.

3. Customs Duties - 126

No warrant is required for the search of an automobile where a border patrol agent detects the odor of marijuana emanating from the automobile.

4. Criminal Law - 412.1(2)

Fact that defendant was wearing handcuffs when he made

certain inculpatory statements was not sufficient to indicate or establish that the statements were coerced.

5. Criminal Law - 412.2(4)

Although defendant insisted on his right to a lawyer when border patrol agent asked defendant to open trunk of car that had been stopped at permanent checkpoint, where defendant had not been taken into custody or given **Miranda** warnings when he asked for a lawyer and where defendant thereafter indicated that he understood his **Miranda** warnings and in absence of any evidence that defendant's decision to speak was involuntary, post-arrest inculpatory statement were admissible.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

Doyle Kent Ogden was convicted of possession of marijuana with intent to distribute. 21 U.S.C. Sec. 841(a) (1). This is companion case to United States v. Rankin, 5 Cir., 1978 ---F.2d---, decided today. Defendant Ogden was represented by the same counsel as Rankin, and the first three contentions on appeal are identical to those raised by Rankin and which we have held to be without merit. Separate treatment of the speedy trial, refusal to plea bargain, and the conduct of voir dire issues is accordingly unnecessary. Defendant Ogden urges that the bricks of marijuana should have been excluded from evidence as the fruit of an illegal search, and that his post-arrest statements should not have been admitted because they were coerced. Finding both of these contentions entirely unconvincing, we affirm.

At 6 a.m. on March 9, 1976, David Rankin, the defendant in the companion case, was stopped at the permanent checkpoint seven miles south of Falfurrias, Texas. After the Border Patrol agent detected the odor of marijuana, Rankin's trunk was searched, and marijuana found. Only twenty-five minutes later defendant Ogden was stopped at the checkpoint. Like Rankin's vehicle, Ogden's car had an Oklahoma license plate in the rear,

and a Fort Sill sticker. The Border Patrol agent noticed that defendant Ogden's car contained an air-freshener, but nevertheless the agent smelled marijuana. The agent asked defendant to open the trunk, but defendant refused, insisting on his right to a lawyer, and a struggle ensued while the agent took the keys from him. Marijuana bricks were found in the trunk.

Defendant was handcuffed, taken into custody along with Rankin and given **Miranda** warnings. While still handcuffed, defendant Ogden declared that he was the main trucker for the Oklahoma people that he was going to be paid \$8,000 to deliver the marijuana, and that he was going to pay Rankin \$1,000 for his help in transporting the contraband.

(1-3) It is apparent from the foregoing facts that the search in this case was lawful. The agent's identification of the odor of marijuana is enough to support probable cause to search. See, e.g. **United States v. Villarreal**, 5 Cir., 1978, 565 F.2d 932, 937. No warrant is required for the search of an automobile under such circumstances. See **United States v. Legeza**, 5 Cir., 1977, 559 F.2d 441; **United States v. Mitchell**, 5 Cir., 1976 (en banc), 538 F.2d 1230, 1232-33, cert. denied, 430 U.S. 945, 97 S.Ct. 1578, 51 L.Ed. 2d 792 (1977).

(4, 5) There is no error in the admission of defendant's post-arrest inculpatory statements. The fact that defendant was wearing handcuffs does not indicate or even suggest that he was coerced. Although defendant asked for his lawyer when he refused to open the trunk, he had not at that time been taken into custody or given the **Miranda** warnings. After he was given the **Miranda** warnings, defendant indicated that he understood them, but nevertheless he chose to inculpate himself. There was no evidence that defendant's decision to speak was anything but voluntary. Cf. **United States v. Cavallino**, 5 Cir., 1974, 498 F.2d 1200, 1202 (where the Court found that the defendant who had asked for an attorney after receiving the **Miranda** warnings had voluntarily changed his mind and chosen to speak without an attorney present).

AFFIRMED.

For The Fifth Circuit

No. 77-5245

Summary Calendar

D. C. Docket No. CR-76-C-199

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOYLE KENT OGDEN,

Defendant-Appellant,

*Appeal from the United States District Court for the
Southern District of Texas
Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.*

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

May 4, 1978

ISSUED AS MANDATE:

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

DOYLE KENT OGDEN,

Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(May 30, 1978)

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the
above entitled and numbered cause be and the same is hereby
DENIED

ENTERED FOR THE COURT:

United States Circuit Judge, Robert Ainsworth

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 1978, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three true and correct copies in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at Wichita Falls, Texas addressed as follows:

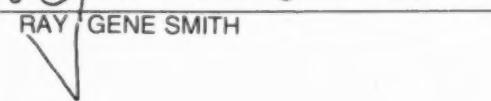
Solicitor General
Department of Justice
Washington, D. C. 20530

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED ON June 29th, 1978 at Wichita Falls, Texas.



RAY GENE SMITH



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